

DRAFT

Supplemental Procedures for National Historic Preservation Act Section 106 Compliance For Solar and Wind Power Generation Applications on Public Lands Managed by BLM, California

Purpose

The purpose of this Supplemental Procedure is to provide guidance and a consistent strategy for completing cultural resources review of both Solar and Wind Applications. The strategy is focused to the extent practicable on completing cultural resources reviews of energy applications in accordance with the *Statewide Protocol Agreement* with the California and Nevada State Historic Preservation Officers in order to satisfy our responsibilities pursuant to Section 106 of the National Historic Preservation Act (NHPA). This guidance is intended to be consistent with the both the *Wind Energy Development Policy* of August 24, 2006 (IM No. 2006-216) and the *Solar Energy Development Policy* of April 4, 2007 (IM No. 2007-97).

Section 106

Section 106 of the National Historic Preservation Act requires that Federal agencies take into account the effect of undertakings on historic properties eligible to or listed on the National Register of Historic Places. Undertakings are defined to include activities that require a Federal permit, license or approval. Because of unique differences in the way that realty actions (undertakings) for solar and wind applications are processed by the Bureau of Land Management (BLM), it is necessary to employ different procedures/strategies at specific stages in each process to comply with the requirements of the *Statewide Protocol Agreement*. In any case, agency review under Section 106 must be concluded prior to the issuance of the Federal permit, license or approval.

Cultural Resources Literature Review and Records Search

For the purposes of analyzing these undertakings at the landscape level, a records search and literature review is required with the objective of developing sufficient information and contexts for the purpose of identifying significant resources and issues that may be relevant to the assessment of effects for the undertaking. However, the records search and literature review may not necessarily require a full BLM Class I cultural overview and documentation as defined in the BLM 8100 Manual. Documentation sufficient for a records search and literature review may include records provided by information centers or other repositories, such as historical societies, museums, and BLM land records, and may include copies of site records, maps, historic maps, lists of reports, surveys, previous cultural resources overviews. The purpose of the records search and literature review is to identify any potentially significant properties or issues that may pose difficulties for the proposed undertaking and future management decision-making.

Tribal Consultation

One of the defining characteristics of most proposed energy projects is their size and scale. Because of the large land areas involved, it is essential to effect the early identification and

analysis of landscape level resources and issues that might normally not be identified in conventional cultural resources survey. As part of this analysis, it is extremely important to identify and contact Native American tribes and other interested parties that may have information on historic properties, sacred sites, traditional cultural properties, or other cultural resources that may be located within the Area of Potential Effect (APE) or may be affected by the proposed undertaking. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural landscapes or other issues that would not normally be identified.

Tribal consultation/contact should be focused on working with tribes at the earliest stages of the proposed undertaking to gather ethnographic information, property information, and other resource information to help identify significant properties or issues, especially information about traditional cultural properties, sacred sites, and cultural landscapes. This will assist in identifying significant issues and resources that are not identified through the course of normal cultural resources survey. The objective of consultation is to identify any potentially significant properties or issues that may pose difficulties for the proposed undertaking and future management decision-making. As this consultation will be conducted on a landscape level scale, it is imperative to provide information and maps that are easily understood by tribal members in the consultation process. Because of the number, size and scale of proposed energy projects in any given area, BLM offices should consider additional strategies for tribal consultation beyond consultation on project specific basis. Offices should consider combining consultations on multiple projects or inviting tribes to meetings where multiple projects may be discussed and coordinated in order to facilitate coordination and information exchange, minimize confusion about the large number of projects, and provide for a more effective and productive process of tribal consultation.

Field units will be responsible for contacting and consulting with Tribes, tribal communities and traditional practitioners, and other interested parties as outlined in 36 CFR 800 and the BLM 8120 Series Manual guidelines. This will also meet BLM government-to-government responsibilities for Tribal consultation.

Differences between Wind Energy and Solar Energy Applications as “Undertakings”

The essential difference between Wind and Solar applications as it relates to defining an “undertaking” for purposes of Section 106 review is a product of the specific realty actions associated with the initial application and associated reservations of land for future development privileges. The wind energy application usually results in the issuance of a 3 year Right-of Way (ROW) for the project area which provides a first-in-line preference to submit a Plan of Development (POD). For the purposes of Section 106, this ROW for the project area is considered an undertaking. For solar energy projects, the equivalent preference interest to submit a POD for an area is guaranteed by the submission of the application on a first in time basis. There is no associated realty action for solar, therefore the undertaking for solar energy projects is identified at the submission of the application and the POD.

Wind Energy Applications, Undertakings, and the Section 106 Process

Because of the unique realty process associated with wind energy applications, it is useful to understand how different application strategies generally interact with review and compliance

activities under the *Statewide Protocol Agreement* and Section 106. Wind energy projects are classified into 3 categories.

Class 1 Wind Projects – For Class 1 wind projects, the Applicant applies only for a ROW for Meteorological (MET) tower and testing. There is no associated ROW application for a project area. This type of application is not common and is typically limited to research by universities and state or local governments. Testing is not generally oriented towards future development scenarios. Section 106 compliance for Class 1 wind projects can generally be handled by completing a records search and literature review, BLM Class III cultural resources survey and tribal consultation. The application can normally be reviewed and processed under the *Statewide Protocol Agreement*. The compliance strategy is to locate MET towers where there are no cultural resource issues.

Class 2 Wind Projects – For Class 2 wind projects, the Applicant usually applies for both a MET Tower testing ROW (undertaking) as well as a ROW for a larger project area (undertaking). This is the typical application process for most wind projects. The ROW for the project area only reserves a first-in-line interest to submit a POD for the area, but conveys no authority to construct or the implication that, at the end of the ROW testing period, approval of a POD is automatic. A separate environmental review process will be carried out at the time of submission of a POD. BLM requires that a records search and tribal consultation be conducted for the ROW for the larger project area for the purpose of identifying significant resources and issues that might not normally be identified during normal archaeological survey. In addition, as with Class 1 wind projects, a BLM Class III cultural resources survey for the proposed MET Tower locations and tribal consultation must be completed prior to the issuance of the MET tower ROW grant.

Class 3 Wind Projects – For Class 3 wind projects, the Applicant submits a POD for a specific area without necessarily testing or having applied for a ROW for a project area. The Class 3 wind project encompasses a specific proposal for the development of a wind farm and will be treated like any other major project for purposes of Section 106. BLM would require full Class III cultural resources survey and tribal consultation for the POD.

Solar Energy Applications, Undertakings, and the Section 106 Process

Cultural resources review of solar projects begins at the time an application is accepted. The application itself reserves a first-in-line interest but conveys no rights. Unlike wind energy, there is no associated realty action that reserves first-in-line interest (ROW, permit, license, or other decision) that constitutes an “undertaking” as defined in 36 CFR §800. Usually the Applicant submits a POD with the application. With the submission of the POD, BLM would require that a Class III cultural resources survey and tribal consultation be completed for the entire POD. However, the Applicant may follow one of several strategies in identifying and delineating the specific area to be developed from a larger land area. As such, this may require a “phased” identification approach for cultural resources. Nevertheless, the end-result of phased identification will result in the identification of a “core” area (APE) that will be surveyed at the Class III level.

Procedures for Evaluating Wind Energy Projects

BLM will complete its responsibilities to identify and take into account effects to historic properties that may be affected by proposed wind energy projects pursuant to Section 106 of the National Historic Preservation Act (NHPA). Depending on the scale, complexity, and issues of a specific wind energy proposal, BLM may comply with Section 106 by either utilizing the provisions of the BLM Protocol or by following the procedures provided in 36 CFR § 800 (Protection of Historic Properties). For projects involving other State or local agency review and approval, the integration of data adequacy requirements will be achieved by involving appropriate agency cultural staff in meetings with the proponents to insure that both BLM and other agency data adequacy requirements are clearly presented to the Applicant.

The BLM strategy for managing the Section 106 review of wind energy projects, which involves testing and specific ROW actions for large land areas, will generally incorporate the following guidelines and requirements:

Class 1 Wind Energy Projects

For Class 1 wind projects, the Applicant applies only for a ROW for MET tower and testing. There is no associated ROW application for a project area. This type of application is not common and is typically limited to research by universities and state or local governments. Testing is not generally oriented towards future development scenarios.

A BLM Class III cultural resources survey will be completed. Tribal consultation will be conducted. BLM will be responsible for identifying tribes that may have an interest in the project area, notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2(c)(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). It is anticipated that MET tower locations will be selected to avoid affects to historic properties. Section 106 will be completed in accordance with the *Statewide Protocol Agreement*.

Class 2 Wind Energy Projects

For Class 2 wind projects, the Applicant usually applies for both a MET Tower testing ROW (undertaking) as well as a ROW for a larger project area (undertaking). This is the typical application process for most wind projects. The ROW for the project area only reserves a first-in-line interest to submit a POD for the area, but conveys no authority to construct or an implied approval that at the end of the ROW period that approval of a POD is automatic. A separate environmental review process will be carried out at the time of submission of a POD.

Records Search and Tribal Consultation: For Class 2 wind projects, a records search and literature review will be submitted for the entire lands initially proposed in the application, regardless of the eventual size of the proposed undertaking. It is assumed that the records search and literature review will be utilized as part of the screening strategy to eliminate lands and reduce the size of the actual acreage needed to arrive at a “core” area that will likely become the area for the proposed Plan of Development

(POD) and on which the ROW would be granted. This will define the Area of Potential Effect (APE) for review under Section 106. Proponents and their consultants should work with BLM to make sure that the records search and literature takes into account the available information in not only the California Historic Resources Information System and Nevada Cultural Resources Information System, but also information that BLM may have for these areas.

As part of the records search and literature review, proponents will be expected to work with BLM to identify and contact Native American tribes that may have information on historic properties, sacred sites, traditional cultural properties, or other cultural resources that may be located within the APE or may be affected by the proposed undertaking. BLM will be responsible for identifying tribes that may have an interest in the project area, notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2(c)(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). The proponent and its consultants may assist BLM in completing these responsibilities. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural landscapes or other issues. This consultation would help identify resources that would not normally be identified during archaeological survey.

BLM Class II Survey and Inventory: For proposed projects for which a large initial project area has been identified, within which a smaller POD will eventually be submitted, the Applicant may propose to conduct a BLM Class II (sampling) survey for the purpose of identifying sensitive archaeological or cultural areas as part of a strategy to eliminate areas of archaeological or cultural concern and to develop a site plan that will eliminate or minimize effects to historic properties. Provision for completing a Class II survey is consistent with 36 CFR § 800.4(b)(2) which allows for the phased identification and evaluation of historic properties where large land areas are involved. The decision to conduct a Class II survey is at the discretion of the Applicant and is not required, although BLM would encourage Applicants to consider the value of utilizing a Class II survey, in addition to the records search and literature review, to assist in the identification, screening and/or elimination of sensitive archaeological and cultural areas from the eventual APE. BLM will generally be supportive of any Class II strategy that the Applicant wishes to employ to assist in the identification of sensitive areas and the screening and elimination of lands that may contain sensitive resources or potentially sensitive cultural issues.

Class 3 Wind Energy Projects

For Class 3 wind projects, the Applicant submits a POD for a specific area whether or not prior testing has occurred or the Applicant has received a ROW for a project area. This application type is not common, but would be processed in similar fashion as any POD for all energy projects. BLM would require full Class III cultural resources survey and tribal consultation.

BLM Class III Survey and Inventory: For all projects for which a specific or “core” project area has been identified (APE) and a Plan of Development submitted, the entire

project area incorporated within the APE and any buffer areas will be surveyed at the BLM Class III cultural resources survey level. The proponent will be expected to work with BLM to identify and contact Native American tribes that may have information on historic properties, sacred sites, traditional cultural properties, or other cultural resources that may be located within the APE or may be affected by the proposed undertaking. BLM will be responsible for identifying tribes that may have an interest in the project area, notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2©(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). The proponent and its consultants may assist BLM in completing these responsibilities. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural landscapes or other issues. This consultation would help identify resources that would not normally be identified during archaeological survey.

Procedures Common to All Classes of Wind Energy Projects

(1) Coordination and Reporting: BLM should establish general processes, following the BLM MOU with the CEC, that provides for coordination on requirements to meet the needs of other federal, state, and local agencies that may be involved in a proposed energy project. The purpose of coordination on this process is to provide Applicants clear and consistent guidelines regarding data needs and data adequacy and to help the Applicant move through the process in an efficient and cost effective manner. At the onset of the proposed project, BLM and other agencies should provide the Applicant guidance regarding conditions and stipulations for fieldwork, reporting requirements, and other expectations, as well as answer any questions the Applicant may have regarding process. BLM should follow to the extent possible these same general procedures for consistency and work closely with the appropriate State or County agency, or investor owned utility to ensure that the requirements of NEPA, CEQA, and the National Historic Preservation Act are being met. In all cases, BLM authorizes field survey activities on public lands and is responsible for compliance with Section 106. All reports must be submitted and approved by BLM prior to submittal to outside agencies unless otherwise agreed to by BLM. BLM letters initiating consultation with the State Historic Preservation Officer (SHPO) should be posted on the California alternative energy web site soon after the letter is sent to SHPO.

(2) Native American Consultation: Consultation with appropriate Tribes will be required for each project. At the time of acceptance of a complete application, BLM will be responsible for identifying tribes that may have an interest in the project area, notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2(c)(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). The proponent and its consultants may assist BLM in completing these responsibilities. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural properties, landscapes or other issues that would not normally be identified during archaeological survey and where potential effects may not be easily resolved. Early initiation of Native American consultation may begin when an applicant applies for authorization to conduct early evaluation procedures, e.g., wind energy testing, geotechnical testing, well or other borings, etc. Native American

consultation letters on individual proposed projects should be posted on the California Desert District alternative energy web page soon after the letters are signed.

(3) Consultation with SHPO: The BLM will endeavor to process these applications under the Protocol to the extent possible until a thresholds condition is reached requiring consultation with SHPO as defined in Section VI of the Protocol.

Procedures for Evaluating Solar Energy Projects

(1) General Process: BLM will complete its responsibilities to identify and take into account effects to historic properties that may be affected by proposed solar energy projects pursuant to Section 106 of the National Historic Preservation Act (NHPA). Depending on the scale, complexity, and issues of a specific solar energy proposal, BLM may comply with Section 106 by either utilizing the provisions of the BLM Protocol or by following the procedures provided in 36 CFR § 800 (Protection of Historic Properties). For projects involving the California Energy Commission (CEC) review and approval (solar thermal proposals greater than 50 megawatts in capacity; does not include passive solar, photo-voltaic proposals), the integration of CEC data adequacy requirements will be achieved according to the terms of the MOU between the CEC and BLM. BLM will involve CEC cultural staff in meetings with the proponents to insure that both BLM and CEC data adequacy requirements are clearly presented to the Applicant. Where the CEC is not involved, BLM will follow these same general procedures for consistency and work closely with the appropriate State or County agency, or investor owned utility to ensure that the requirements of NEPA, CEQA, and the National Historic Preservation Act are being met.

The BLM strategy for managing the Section 106 review of solar energy projects, which require large land areas, may follow differing strategies depending on the nature of the proposal, but will generally incorporate the following guidelines and requirements:

a. Records Search and Tribal Consultation

1. For all projects, a records search and literature review will be submitted for the entire lands initially proposed in the application, regardless of the eventual size of the proposed undertaking. It is assumed that the records search and literature review will be utilized as part of the screening strategy to eliminate lands and reduce the size of the actual acreage needed to arrive at a “core” area that will likely become the area for the proposed Plan of Development (POD) and on which the right-of-way would be granted. This will define the Area of Potential Effect (APE) for review under Section 106. Proponents and their consultants should work with BLM to make sure that the records search and literature takes into account the available information in not only the California Historic Resources Information System and Nevada Cultural Resources Information System, but also information that BLM may have for these areas.

2. As part of the records search and literature review, proponents will be expected to work with BLM to identify and contact Native American tribes that may have information on historic properties, sacred sites, traditional cultural properties, or other cultural resources that may be located within the APE or may be affected by the proposed undertaking. At the time of acceptance of a complete application, BLM will be responsible for identifying tribes that may have an interest in the project area,

notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2(c)(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). The proponent and its consultants may assist BLM in completing these responsibilities. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural landscapes or other issues. This consultation would help identify resources that would not normally be identified during archaeological survey.

b. BLM Class II Survey and Inventory

1. For proposed projects for which a large initial project area has been identified, within which a smaller POD will eventually be submitted, the Applicant may propose to conduct a BLM Class II (sampling) survey for the purpose of identifying sensitive archaeological or cultural areas as part of a strategy to eliminate areas of archaeological or cultural concern and to develop a site plan that will eliminate or minimize effects to historic properties. Provision for completing a Class II survey is consistent with 36 CFR § 800.4(b)(2) which allows for the phased identification and evaluation of historic properties where large land areas are involved. The decision to conduct a Class II survey is at the discretion of the Applicant and is not required, although BLM would encourage Applicants to consider the value of utilizing a Class II survey, in addition to the records search and literature review, to assist in the identification, screening and/or elimination of sensitive archaeological and cultural areas from the eventual APE. BLM will generally be supportive of any Class II strategy that the Applicant wishes to employ to assist in the identification of sensitive areas and the screening and elimination of lands that may contain sensitive resources or potentially sensitive cultural issues. When the Applicant has identified a “core” area that will become the area for which the POD is likely to encompass, those lands will be surveyed in accordance with BLM Class III guidelines and, for projects involving the CEC, must also meet data adequacy requirements of the CEC.

c. BLM Class III Survey and Inventory

1. For all projects for which a specific or “core” project area has been identified and a Plan of Development submitted, the entire project area incorporated within the ROW and any buffer areas will be surveyed at the BLM Class III inventory level.

d. Coordination and Reporting

1. BLM has established a general process, with the CEC, for coordination on requirements to meet the needs of both agencies. The purpose of this process is provide Applicants clear and consistent guidelines regarding data needs and data adequacy and to help the Applicant move through the process in an efficient and cost effective manner. At the onset of the proposed project, BLM and CEC will provide the Applicant guidance regarding conditions and stipulations for fieldwork, reporting requirements, and other expectations, as well as answer any questions the Applicant may have regarding process. Where the CEC is not involved, BLM will follow these same general procedures for consistency and work closely with the appropriate State or County

agency, or investor owned utility to ensure that the requirements of NEPA, CEQA, and the National Historic Preservation Act are being met.

2. In all cases, BLM authorizes field survey activities on public lands and is responsible for compliance with Section 106. All reports must be submitted and approved by BLM prior to submittal to outside agencies unless otherwise agreed to by BLM. BLM letters initiating consultation with the State Historic Preservation Officer (SHPO) should be posted on the California alternative energy web site soon after the letter is sent to SHPO

(2) Native American Consultation: Consultation with appropriate Tribes will be required for each project. At the time of acceptance of a complete application, BLM will be responsible for identifying tribes that may have an interest in the project area, notifying the tribes of the project, and formally consulting with the tribes pursuant to agency responsibilities under 36 CFR § 800.2(c)(B)(ii) and the *Executive Memorandum of April 29 1994* (FR Doc. 94-10877). The proponent and its consultants may assist BLM in completing these responsibilities. It is essential that rigorous and meaningful tribal consultation be carried out early in the application process to identify issues and concerns that may rise above and beyond specific archaeological or historic properties, which may involve sacred sites, traditional cultural landscapes or other issues that would not normally be identified during archaeological survey and where potential effects may not be easily resolved. Early initiation of Native American consultation may begin when an applicant applies for authorization to conduct early evaluation procedures, e.g., solar energy testing, geotechnical testing, well or other borings, etc.

(3) Consultation with SHPO: Process these applications under the Protocol to the extent possible until a thresholds condition is reached requiring consultation with SHPO as defined in Section VI of the Protocol.

Revision and Termination

The parties to this Amendment shall review the terms of this Amendment during scheduled reviews of the Statewide Protocol Agreement in order to determine whether continuation, revision, or termination is appropriate. Any party may propose revisions or terminate this Amendment by providing 90 days notice of the intent to terminate; all parties to this Amendment shall enter active negotiations to avoid termination.

This Amendment shall expire and have no further force or effect at midnight of the fifth anniversary of the Amendment's date of execution unless continuation for a specific period is mutually agreed between all parties.

STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, CALIFORNIA

By Mike Pool

Date: _____

STATE HISTORIC PRESERVATION OFFICER, CALIFORNIA

By Milford Wayne Donaldson

Date: _____

STATE HISTORIC PRESERVATION OFFICER, NEVADA

By Ronald M. James

Date: _____